STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2010
v JEFFREY BERNARD GORECKI, Defendant-Appellant.	No. 288902 Macomb Circuit Court LC No. 2008-001783-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JEFFREY BERNARD GORECKI, Defendant-Appellant.	No. 288965 Macomb Circuit Court LC No. 2008-001784-FC

Before: TALBOT, P.J., and FITZGERALD and M.J. KELLY, JJ.

PER CURIAM.

Defendant was convicted by a jury in LC No. 2008-001784-FC of assault with intent to commit murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, and interfering with a crime report, MCL 750.483a(2)(a). He was also convicted in LC No. 2008-001783-FH of unlawfully driving away an automobile (UDAA), MCL 750.413. He was sentenced as a third habitual offender, MCL 769.11, to prison terms of 31-1/4 to 50 years for the assault with intent to commit murder conviction, 10 to 20 years for the home invasion conviction, two to four years for the felonious assault conviction, and jail terms of 211 days each for the interfering with a crime report and UDAA convictions, all sentences to be served concurrently. He appeals as of right. We affirm.

I. BACKGROUND

Defendant's UDAA conviction arises from evidence that he refused to return a Ford Fusion leased by his girlfriend (hereafter the "victim") after their relationship ended in January 2008, and she demanded that he move out of the condominium that they shared. On March 17,

2008, after defendant had refused to return the vehicle, the victim reported to the police that the vehicle had been stolen.

The victim also changed the door locks and code for the garage door opener at the condominium. According to the victim, she agreed to meet with defendant at her condominium on March 25, 2008, provided that he would arrive by 8:00 p.m. When he failed to appear by the designated time, she informed him by telephone not to come over. The victim later fell asleep on a couch and woke up to find defendant standing over her. According to the victim, defendant thereafter struck her on the head with a statue that she kept in an upstairs bedroom. He also threatened to kill her and said that no one else could have her. Defendant was later arrested when the police searched a condominium located across the street. The victim's leased vehicle and a knife from the victim's condominium were found in the garage. Defendant claimed self-defense at trial. He conceded that he struck the victim several times on the head, but claimed that he grabbed the statue from a coffee table and reacted each time to the victim lunging at him with a knife. Defendant also claimed that the victim consented to his entry into the condominium, and he also asserted a right or belief that he could enter it without her permission.

II. EXCLUDED DEFENSE EVIDENCE

On appeal, defendant argues that the trial court violated his due process right to present a defense by excluding testimony critical to his claim of self-defense. Not all trial errors will amount to a denial of due process, and "[m]erely framing an issue as constitutional does not make it so." *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008). Further, a defendant's due process right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984); *People v Unger*, 278 Mich App 210, 249-250; 749 NW2d 272 (2008). "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Hayes*, 421 Mich at 279, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Established rules require that a proponent of evidence satisfy foundational requirements for its admission. See MRE 103(a)(2); *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989), overruled in part on other grounds by *People v Barrett*, 480 Mich 125 (2008); *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999).

Although defendant challenged the trial court's exclusion of the evidence in question at trial, he did not do so on the basis that it violated his constitutional right to present a defense. Therefore, defendant failed to preserve his constitutional argument. Cf. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (objection to evidence on one ground does not preserve an appellate attack on a different ground). Accordingly, we review this unpreserved constitutional claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999); see also *People v Borgne*, 483 Mich 178, 196-197; 768 NW2d 290 (2009). To the extent that defendant also challenges the trial court's rejection of his specific offers of proof at trial, we review these preserved evidentiary claims for an abuse of discretion. *Unger*, 278 Mich App at 216. "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217.

Essential to the admission of evidence is its purpose. "That our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible

for other purposes." *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Defendant argues that the excluded testimony was relevant to his theory of self-defense, which requires that a defendant act in response to an assault. *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). A defendant may act in self-defense if he has an honest and reasonable belief that the use of force is necessary to defend himself, MCL 780.972; *People v Riddle*, 467 Mich 116, 142 n 30; 649 NW2d 30 (2002), but he may not use "more force than necessary to defend himself," *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

A. EXCLUSION OF STACY MARGINET'S TESTIMONY

Defendant argues that the trial court erred in sustaining the prosecutor's hearsay objection to Stacey Marginet's testimony regarding statements that defendant made to her on March 10, 2008, after defendant was involved in an altercation with the victim.[1]

While we agree with defendant that evidence offered to show the effect of a statement on the listener is not hearsay because the truth or falsity of the statement is not relevant, *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995); *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994), it is clear from the record that defense counsel did not offer the evidence of defendant's statements to show their effect on Marginet. Rather, defendant principally relied on the hearsay exceptions in MRE 803(1) and (2) as a basis for admitting defendant's statements to Marginet regarding the March 10, 2008, physical altercation between defendant and the victim.

MRE 803(1) provides that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is not excluded by the hearsay rule. "This Court is not overly literal in construing the phrase 'immediately thereafter' and will allow a statement made less than a minute or even several minutes after the event observed to qualify under this exception." *People v Bowman*, 254 Mich App 142, 145; 656 NW2d 835 (2002). Here, the trial court found defense counsel's argument that defendant made his statements to Marginet minutes after he was involved in the altercation with the victim to be an inadequate offer of proof. With the exception of rules applicable to privileges, a trial court is not bound by the rules of evidence in making preliminary rulings regarding the admissibility of evidence. MRE 104(a); *Barrett*, 480 Mich at 133-134. The evidence before the court indicated that defendant had to travel an indeterminate distance from the victim's condominium in Shelby Township to Marginet's home in Sterling Heights. Moreover, the testimony did not clearly indicate that defendant went to Marginet's home immediately after leaving the victim's condominium. Under the circumstances, the trial court did not abuse its discretion in finding that defendant's statements to Margaret regarding his altercation with the victim did not qualify as present sense impressions under MRE 803(2).

MRE 803(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not

[1] At trial, defendant argued that the challenged testimony was admissible under several different evidentiary rules, including MRE 806. On appeal, he does not address MRE 806, thereby abandoning any reliance on that rule as a basis for admission. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

excluded by the hearsay rule. Under this rule, the trial court is allowed to consider the statement, along with other evidence, to prove the existence of a startling event or condition. *Barrett*, 480 Mich at 127-128, 132. In addition to a startling event or condition, the proponent of the evidence must show that the resulting statement was made while under the excitement caused by the event or condition. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

Although Marginet testified that defendant appeared upset when he arrived at her home, given the travel time between the victim's condominium and Marginet's home, the trial court did not abuse its discretion in determining that defendant failed to sufficiently show that he lacked the capacity and opportunity for fabrication. *Bowman*, 254 Mich App at 146-147. A trial court has wide discretion in determining if the declarant was still under the stress of the event or condition. *Smith*, 456 Mich at 552. A trial court's decision on a close evidentiary question ordinarily does not constitute an abuse of discretion. *Sabin*, 463 Mich at 67.

Furthermore, even if the trial court abused its discretion in excluding Marginet's testimony regarding defendant's statements, we are satisfied that any error was harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); *Blackmon*, 280 Mich App at 270. Evidence of a threat by a victim against a defendant at or near the time of an assault, or conversely the victim's fear of a defendant, may be admissible where a defendant claims self-defense because it is indicative of the defendant's state of mind. *People v White*, 401 Mich 482, 504; 257 NW2d 912 (1977), overruled in part on other grounds *People v Koonce*, 466 Mich 515 (2002); see also *People v Smelley*, 285 Mich App 314, 325; 775 NW2d 350 (2009), vacated in part on other grounds 485 Mich 109 (2010). A threat communicated by a victim to the defendant may also be admissible to show the defendant's state of mind, that is, a reasonable apprehension of danger. *People v Cameron*, 52 Mich App 463, 465-466; 217 NW2d 401 (1974). Evidence of a victim's prior assaults may also be admissible where a defendant claims self-defense. *People v Rockwell*, 188 Mich App 405, 408-410; 470 NW2d 673 (1991).

Here, defendant had an opportunity through his own testimony to describe the events of March 10, 2008, and his position that the victim was physically more aggressive then she indicated in her own testimony. Defendant also presented the testimony of a neighbor, Matthew Parrott, regarding what he heard on the night of March 10 to contradict the victim's testimony that their fighting did not create a "loud crashing sound." Marginet's excluded testimony would not have assisted defendant in presenting his position that he struck the victim on the head with a statue because she lunged at him with a knife two weeks later on March 25. The mere fact the case involved credibility issues does not establish prejudice. Where a case involves a one-on-one credibility contest between a defendant and the victim, the pertinent focus is on whether corroborating evidence on either side could "tip the scales." *People v Straight*, 430 Mich 418, 427-428; 424 NW2d 257 (1988); *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (1979). Considering the evidence in its entirety, it is not more probable than not that the excluded statements concerning the March 10 altercation affected the outcome. *Lukity*, 460 Mich at 495-496.

B. EXCLUSION OF DEFENDANT'S TESTIMONY

Defendant only briefly addresses the trial court's exclusion of portions of his own testimony on hearsay grounds. An "appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory

treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Even if we overlook this deficiency, defendant has not established any basis for reversal of his convictions.

To the extent that defendant relies on the trial court's exclusion of certain statements by the victim on March 10, 2008, there is no indication in the record that the excluded testimony pertained to any threats, with the exception of defense counsel's offer of proof that defendant would testify that the victim informed him by telephone, after he left the condominium, that her brother-in-law would be coming for him. Although the trial court did not allow the proffered testimony, it allowed defendant to testify regarding how the victim's message affected him. Defendant stated that he felt like he was "getting cornered." He also stated that he was "not worried about the brother-in-law," but explained that he "didn't know who all was coming there." Notwithstanding defendant's stated concern, defendant also testified that he returned to the victim's condominium several times before March 25, 2008. He also presented evidence that he received a text message from the victim on March 17, which indicated that he "was going to wind up dead or in jail." Marginet had similarly testified that she received a text message from the victim after March 10, which indicated that if defendant was not found, he could end up in jail or dead.[2] Examining the record in its entirely, even assuming that defendant's state of mind on March 10 was relevant to his self-defense claim, defendant has failed to show that he was prejudiced by the exclusion of the evidence, i.e., that it is more probable than not that the excluded testimony was outcome determinative. *Lukity*, 460 Mich at 495-496.

Similarly, even if the trial court erred in excluding defendant's testimony regarding some of the statements made by victim at the time of the March 25, 2008, incident, defendant has failed to demonstrate prejudice. The record does not support defendant's claim that the trial court excluded testimony that the victim made a verbal threat again him. Furthermore, it is apparent from the record that defendant was able present his theory that the victim became angry during a discussion about their relationships with others and his admission that he had slept with another woman in the victim's bed, and that he ultimately reacted in self-defense to the victim lunging at him with a knife. In addition, the jury had an opportunity to view a videotape of defendant's interviews with Detective Terrance Hogan, the second of which contained defendant's presentation of his self-defense claim. Thus, even assuming some evidentiary error, it does not affirmatively appear from the record that it is more probable than not that any error was outcome determinative. *Lukity*, 460 Mich at 495-496; *Blackmon*, 280 Mich App at 270.

Turning to defendant's unpreserved claim that the excluded evidence infringed on his constitutional right to present a defense, we find no plain error. *Carines*, 460 Mich at 774. Although there are circumstances where hearsay evidence critical to a defense is admissible, *People v Herndon*, 246 Mich App 371, 411; 633 NW2d 376 (2001), defendant has failed to establish that any of the excluded evidence was critical to his claim that he reacted to the victim lunging at him with a knife by striking her on the head with a statue.

[2] The victim explained that she sent the message because she was concerned that defendant would commit suicide, or end up in jail because she had made a police report regarding her leased vehicle being stolen.

III. DETECTIVE HOGAN'S TESTIMONY

Defendant next argues that the trial court erred in allowing Detective Hogan to express an opinion regarding his guilt and credibility.

To the extent that defendant relies on defense counsel's objection to the prosecutor's direct examination of Detective Hogan regarding his tactic of lying to defendant in order to extract information, the record reflects that defense counsel's only objections were that Detective Hogan's explanation of his interview technique was "almost like parole [sic] evidence" and that Detective Hogan went beyond explaining the interview technique when he testified that he "[d]idn't mean it then and *I don't mean it now*" (emphasis added).

Where evidence of a police officer's state of mind during an investigation is presented, a fundamental consideration is the relevance of the evidence. *People v Wilkins*, 408 Mich 69, 72-73; 288 NW2d 583 (1980). Here, defendant does not address the trial court's decision to allow Detective Hogan to explain his state of mind to provide an understanding of how the interview was conducted. Therefore, we will not consider that particular issue further. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Detective Hogan's additional testimony regarding whether he still did not mean a statement that he made to defendant during the interview was unresponsive to the prosecutor's question. Because defendant did not move for a mistrial based on the unresponsive testimony, and we are satisfied that a mistrial would not have been an appropriate remedy, there is no basis for appellate relief. *Carines*, 460 Mich at 763. Any perceived prejudice caused by Detective Hogan's nonresponsive testimony could have been cured by a request to strike it and a cautionary instruction. "[I]nstructions are presumed to cure most errors." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

Defendant concedes that the trial court sustained a later objection to Detective Hogan providing an explanation for why he did not believe defendant's "story" in one of the videotaped interviews. Although the trial court later allowed Detective Hogan to testify regarding the procedure for requesting a warrant from the prosecutor to charge defendant, and to explain that he requested the warrant because he felt that defendant had committed a crime, defense counsel's only objection to the testimony was that it was not relevant. Because defense counsel did not object to the testimony on the ground that it could be viewed as vouching for the victim's credibility, or opining that defendant was not credible, defendant's present challenge to the testimony on this ground was not preserved. *Asevedo*, 217 Mich App at 398. Further, even assuming some plain error, defendant has failed to show that it affected his substantial rights. MRE 103(d); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *Carines*, 460 Mich at 763. Defense counsel's opening statement portrayed Detective Hogan as not believing defendant during the investigation. Consistent therewith, defendant testified that he felt that the police were only looking at one side of the incident. Even without Detective Hogan's disputed testimony, the jury would have understood that it was Detective Hogan's belief that defendant had not been truthful. Thus, the testimony was not outcome determinative. *Id.*; see also *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

IV. DOUBLE JEOPARDY

Defendant next argues that his convictions for both assault with intent to commit murder and felonious assault violate state and federal double jeopardy protections against multiple punishments for the same offense. We disagree.

Pursuant to *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007), the Michigan Constitution's protection against multiple punishments for the same offense in Const 1963, art 1, § 15, is determined under the federal "same elements" test in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), which is used to analyze a double jeopardy challenge under the Fifth Amendment of the United States Constitution. Where the Legislature has not clearly expressed its intent to authorize multiple punishments, multiple convictions and sentences are permitted if each offense has an element that the other does not. *Smith*, 478 Mich at 316, 324.

Felonious assault requires the use of a dangerous weapon "without intending to commit murder or to inflict great bodily harm less than murder." MCL 750.82(1). The elements are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007), our Supreme Court determined that multiple convictions for both felonious assault and assault with intent to do great bodily harm less than murder, MCL 750.84, do not violate double jeopardy protections because the crimes have different elements. The latter offense is distinguishable from assault with intent to commit murder, MCL 750.83, only by the nature of the specific intent. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). Based on the reasoning in *Strawther*, it follows that dual convictions for felonious assault and assault with intent to commit murder do not violate double jeopardy protections.

V. SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence in support of his first-degree home invasion conviction. We review de novo a challenge to the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the elements of the offense proven beyond a reasonable doubt. *Unger*, 278 Mich App at 222. "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight and the credibility of the witnesses." *Id.*

Defendant was charged with the form of first-degree home invasion that prohibits an entry without permission and the commission of an assault, while armed with a dangerous weapon or while another person is lawfully present. MCL 750.110a(2). Defendant argues that the unlawful entry element was not satisfied because the victim's testimony established that he was a tenant after their boyfriend-girlfriend relationship ended, and that, as a tenant, he had a right to enter the condominium on March 25, 2008, because the victim did not take legal steps to evict him.

The home invasion statute defines "[w]ithout permission" as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." MCL 750.110a(1)(c). Thus, the essential issue on appeal

is whether the evidence showed that defendant was a lessee, with his own right to enter the condominium.

We disagree with defendant that the victim's testimony established such a right. Although defense counsel used the terms "tenant" and "rent" when cross-examining the victim, the character of such a relationship ordinarily presents a question of fact and law. *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 439; 581 NW2d 794 (1998). A fundamental criterion that distinguishes a tenant from a guest is possession and control. *Id.* at 443. "A tenant has exclusive legal possession and control of the premises against the owner for the term of the leasehold, whereas a guest is a mere licensee and only has a right to use the premises he occupies, subject to the proprietor's retention of control and right of access." *Id.* at 443. "The distinction between a guest and a tenant is significant whereby a guest is not entitled to notice of termination and can be the subject of self-help eviction, including a lockout, by the proprietor, while a tenant has protection against such measures." *Id.* at 438.

Viewed in a light most favorable to the prosecution, the evidence established that defendant was a mere guest in the victim's condominium, and that the victim had terminated defendant's right to enter her condominium. There was no evidence that the victim had relinquished possession or control of the premises to defendant. Thus, defendant's claim of a right to enter the condominium, based on the existence of a landlord-tenant relationship, fails as a matter of law.

VI. JURY INSTRUCTIONS

Defendant additionally argues that the trial court erred by refusing to give his proposed jury instruction explaining principles of landlord-tenant relationships to the jury.

We review jury instruction issues involving questions of law de novo, but a trial court's determination regarding the applicability of an instruction to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *Dobek*, 274 Mich App at 82. Courts are not required to use standard jury instructions for criminal trials. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985); *People v Stephan*, 241 Mich App 482, 495 n 10; 616 NW2d 188 (2000). Where a trial court fails to give a requested instruction, reversal is required only if the requested instruction "(1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

> A trial court is not obligated to give verbatim a requested jury instruction if, in the court's judgment, the language of the instruction requested is confusing, inarticulate, inartfully organized or simply difficult to understand. However, where there is evidence to support the defense theory, the trial court must instruct the jury on the theory. [*People v Ritsema*, 105 Mich App 602, 609; 307 NW2d 380 (1981) (citations omitted).]

Having considered the evidence presented at trial, we conclude that the trial court appropriately rejected defendant's proposed instruction as confusing. The instruction was drafted using statutory provisions defining "landlord" and "tenant" in the landlord and tenant relationships act, MCL 554.601, which has no application to this case.[3] It also incorporated Michigan Civil Jury Instruction 101.03, which applies to civil termination actions, a definition of "rent" taken from *Grant v Detroit Ass'n of Women's Clubs*, 443 Mich 596, 603; 505 NW2d 254 (1993), and a statutory provision in the real and personal property act that contains notice requirements for terminating an estate at will or by sufferance, or where the tenant neglects to pay rent, MCL 554.134(1) and (2). The proposed instruction provided an incomplete statement of the characteristics necessary to establish a landlord-tenant relationship. In particular, it did not address the element of possession and control that is fundamental to a landlord-tenant relationship. *Ann Arbor Tenants Union*, 229 Mich App at 443; see also *Grant*, 443 Mich at 605 n 6.

While some instruction regarding the requirements of a landlord-tenant relationship may have been appropriate in light of defense counsel's use of tenancy language when cross-examining the victim, even the defense proofs failed to establish the type of exclusive possession and control that is characteristic of a landlord-tenant relationship. Because there was no evidence to support defendant's theory of a landlord-tenant relationship, the failure to give defendant's proposed instruction did not affect his ability to present a claim-of-right defense. *Ritsema*, 105 Mich App at 609.

We further note that the trial court gave the consent instruction drafted by defendant, along with a claim-of-right instruction based on CJI2d 7.5. The standard instruction, while specifically written for crimes where there is an "intent to steal" property, was modified to require that the prosecutor prove beyond a reasonable doubt that defendant entered the property without a good-faith belief that he had a right to do so.[4] Considering the instructions as a whole, defendant has failed to demonstrate that they were insufficient to protect his rights. *Dobek*, 274 Mich App at 82.

VII. SENTENCING ISSUES

Defendant challenges the trial court's scoring of three sentencing guidelines variables. We review de novo questions of law involving the sentencing guidelines. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). A trial court's scoring decision will be upheld if there is any evidence to support it. *Id.*

[3] A primary purpose of the landlord and tenant relationships act is to provide protection against a landlord's practices involving security deposits. See *Oak Park Village v Gorton*, 128 Mich App 671, 680; 341 NW2d 788 (1983). The act also requires that a rental agreement give a tenant a right to terminate a lease after 13 months under certain circumstances. MCL 554.601a.

[4] We express no opinion regarding whether such a good-faith belief properly may serve as a defense to a charge of first-degree home invasion under MCL 750.110a because that issue is not before us.

Defendant first challenges the trial court's decision to score ten points for offense variable (OV) 19. MCL 777.49(c) provides that OV 19 is to be scored at ten points if the "offender otherwise interfered with or attempted to interfere with the administration of justice." Here, the trial court found that the score was supported by defendant's conviction of interfering with a crime report. Although defense counsel objected to the ten-point score at sentencing, he did not state a reason for the objection. A defendant must state specific objections to preserve an issue for appeal. See *People v Kennie*, 147 Mich App 222, 225-226; 383 NW2d 169 (1985). Thus, we consider this issue unpreserved, limiting our review to plain error. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

In *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004), our Supreme Court held that "[c]onduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." Even if the Supreme Court impliedly overruled *Barbee* when it ruled in *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009), that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable" the evidence still supports the trial court's scoring of OV 19 in this case. Although defendant argues that the assault that was the basis for his assault with intent to commit murder conviction only occurred while he was striking the victim with the statue, the essence of an assault is "an attempt or threat of force or violence to do corporeal harm to another." *Brown*, 267 Mich App at 147, quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). An assault may be made by "either an attempt to commit a battery or an unlawful act that places the other person in reasonable apprehension of receiving an immediate battery." *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979) (citation omitted). The victim's testimony at trial regarding how defendant prevented her from using the telephone to call for help during the events in the living room, where defendant struck the victim on the head and threatened to kill her, was sufficient to support the trial court's scoring decision for OV 19.

Defendant also challenges the trial court's decision to score 25 points for OV 13, which is appropriate when the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Conversely, a ten-point score is appropriate when the offense was "part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property." MCL 777.43(1)(d). Defendant's only preserved challenge to the scoring of OV 13 is his claim that his felonious assault conviction should be vacated on double jeopardy grounds. As previously explained, however, defendant's convictions for both felonious assault and assault with intent to commit murder do not violate double jeopardy protections.

Because defendant failed to object to the scoring of OV 13 on the ground that, independent of any double jeopardy concerns, there was a "single assault," this issue is unpreserved and, therefore, is subject to review for plain error. *Kimble*, 470 Mich at 312. Further, defendant's directed verdict motion at trial was not sufficient to preserve a challenge to the trial court's use of the first-degree home invasion crime to score OV 13 at sentencing. "[T]he standard of proof applicable to the guidelines scoring process differs from the reasonable doubt standard underlying conviction of an offense." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Moreover, OV 13 does not require that a crime result in a conviction. MCL 777.43(2)(a). In any event, as indicated previously, the evidence was sufficient to support

defendant's first-degree home invasion conviction. Further, concurrent convictions may be used to score OV 13. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). Therefore, we find no support for defendant's argument that OV 13 was misscored.

Finally, having upheld each of defendant's convictions, we reject defendant's unpreserved claim that prior record variable (PRV) 7, MCL 777.57, was also misscored.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly